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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the District of Columbia Circuit affirming the FCC's end user access charge orders conflicts with this Court's decision in Smith v. Illinois Bell Telephone Company?

2. Whether the decision of the District of Columbia Circuit affirming the sufficiency of the FCC's notice and comment proceedings was a departure from the procedural requirements of section 205(a) of the Communications Act of 1934?

PARTIES

Petitioners, the National Association of State Utility Consumer Advocates (NASUCA) and South Carolina Consumer Advocate (SCCA), incorporate by reference the parties to the proceeding before the U.S. Court of Appeals for the District of Columbia listed in the Petition for a Writ of Certiorari filed by the National Association of Regulatory Utility Commissioners (NARUC).

The National Association of State Utility Consumer Advocates (NASUCA) consists of the following member states:

Alabama - Office of Attorney General (Consumers' Utility Counsel Section)

Arkansas - Office of Attorney General (Consumer Utilities Rate Advocacy Division)

Arizona - Residential Utility Consumer Office

Colorado - Office of Consumer Counsel

Connecticut - Consumer Counsel (Division of Consumer Counsel)

Delaware - Office of the Public Advocate

District of Columbia - Office of Peoples Counsel

Florida - Office of the Public Counsel

Georgia - Consumers' Utility Counsel

Hawaii - Department of Regulatory Agencies (Division of Consumer Advocacy)

Illinois - Governor's Office of Consumer Services and Office of Attorney General (Public Utilities Division)

Iowa - Office of Consumer Advocate

Kentucky - Office of Attorney General (Consumer Protection Division)

Maine - Office of the Public Advocate

Maryland - Office of Peoples Counsel

Massachusetts - Department of Attorney General (Public Protection Bureau - Utilities Division)

Michigan - Department of Attorney General

Minnesota - Office of Attorney General

Missouri - Public Counsel of Missouri

Nevada - Attorney General's Office of Advocate of Customers of Public Utilities

New Jersey - Department of the Public Advocate (Division of Rate Counsel)

New York - New York State Consumer Protection Board (Utility Intervention Office) and Attorney General's Division for Energy and Utilities

North Carolina - North Carolina Utilities Commission (Public Staff)

Ohio - Office of the Consumers' Counsel

Pennsylvania - Office of Consumer Advocate

South Carolina - Office of Consumer Advocate (Department of Consumer Affairs) (Steven W. Hamm, President of NASUCA)

South Dakota - Attorney General's Office

Texas - Office of Public Utility Counsel

Utah - Utah Committee of Consumer Services

Virginia - Office of Attorney General (Division of Consumer Counsel)

Washington - Attorney General's Office (Public Counsel Section)

West Virginia - West Virginia Public Service Commission (Consumer Advocate Division)

Wisconsin - Citizens' Utility Board

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Association of State Utility Consumer Advocates (NASUCA) and South Carolina Consumer Advocate (SCCA) within the South Carolina Department of Consumer Affairs jointly petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on June 12, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is attached as Appendix A to NARUC's Petition for a Writ of Certiorari. The Federal Communications Commission's access charge order is reported at 93 F.C.C. 2d 241 (1983). The Commission's order on initial reconsideration is reported at 48 Fed. Reg. 42,984 (1983). The Commission's order on further reconsideration is reported at 49 Fed. Reg. 7,810 (1984). NARUC has previously filed one complete set of the FCC's orders with this Court.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on June 12, 1984. This

petition was filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

STATUTES AND REGULATIONS

The full text of authoritative statutory provisions are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioners NASUCA and SCCA hereby adopt and incorporate by reference the Statement of the Case set forth by NARUC. In addition, Petitioners inform the Court that they unsuccessfully advocated the two arguments comprising the Reasons for Granting the Writ, inter alia, before the District of Columbia Circuit.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CONFLICTS WITH THIS COURT'S DECISION IN SMITH V. ILLINOIS BELL TELEPHONE COMPANY.

The Communications Act of 1934 establishes the FCC's jurisdiction to regulate interstate and foreign communications, expressly reserving "charges,

classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service" to the States. 47 U.S.C. sec. 151, 152(b). The FCC and the State Utility Commissions exercise their jurisdictional responsibilities over certain telephone investment and expenses which may be used jointly for interstate and intrastate services. The process of allocating these investments and expenses between the state and federal jurisdictions is known as "Separations". The separations process allocates a local exchange company's Non-Traffic Sensitive (NTS) investment and expenses between the state and federal jurisdictions and finds its genesis in this Court's decision in Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930).

Prior to the Smith decision and codification of the separations process in 47

U.S.C. sec 410(c), most local telephone companies did not receive compensation from interstate carriers for the local telephone companies' costs incurred in originating and terminating toll calls. Due to the inability physically to divide the jointly used local telephone company investment between local (intrastate) and interstate usage, the costs of the jointly used local exchange property[1] were allocated entirely to the intrastate service and no portion was recovered from AT&T. This method of cost recovery, known as "board-to-board" ratemaking, was utilized by Illinois Bell and a number of other States'

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[1] The local exchange property used jointly for intrastate and interstate calls was defined in Smith v. Illinois Bell as "the property used at the subscriber's station and from that station to the toll switchboard, or to the toll trunk lines...." 282 U.S. at 150.

utility commissions at the time of Smith v. Illinois Bell.[2]

In Smith v. Illinois Bell, the appellant, Illinois Commerce Commission, attacked the "board-to-board" ratemaking methodology employed by Illinois Bell, arguing that the Company's method was improper since the subscribers' station and other local exchange facilities which were classified by the company as intrastate, were in fact also used in the origination and termination of interstate calls. The appellants maintained, therefore, that AT&T should properly reimburse Illinois Bell for its use of the local exchange facilities to complete interstate calls.

The alternative ratemaking theory

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[2] See, Re Indiana Telephone Co., P.U.R. 1922C 348 (Ind.); Michigan State Telephone Co., P.U.R. 1923A, 30 (Mich.); Re Northwestern Bell Telephone Co., P.U.R. 1922C, 762 (Minn.); Buck v. New York Tel. Co., P.U.R. 1921E, 798 (N.Y.).

advanced by the appellants in Smith v. Illinois Bell was called "station-to-station" ratemaking. "Station-to-station" ratemaking apportions the costs of exchange plant between exchange and toll service. It is conceptually supported by the fact that all plant from the originating to the terminating telephone station, as well as local switching, are used and necessary in order to complete toll calls.

This Court in Smith v. Illinois Bell concurred with the appellant's contention that some separation of the local exchange plant was necessary to relieve exchange ratepayers of the inequitable burden of subsidizing toll service:

> While the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential, it is quite another matter to ignore altogether the actual uses to which the proper is put. It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden ....

282 U.S. at 150-151. (Citations omitted; emphasis added).

Moreover, the Court emphasized that separation of a local exchange company's facilities between intrastate and interstate investment, expenses, and revenues was jurisdictionally "essential to the appropriate recognition of the competent governmental authority in each field of regulation." Id. at 148. The Smith v. Illinois Bell decision thus emphatically marked the abandonment of "board-to-board" ratemaking and held that, for the purposes of fixing fair and reasonable rates for interstate and intrastate service, the local exchange carrier must be reimbursed from within the interstate jurisdiction for the use of local exchange facilities by the interstate carriers.

The FCC's Access Charge Order reallocating Non-Traffic Sensitive (NTS) costs[3]

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[3] The FCC's Access Charge Order describes NTS as follows:

back to local exchange customers through a flat charge that is a condition precedent to obtaining local service, Id. at para. 5, constitutes nothing short of a reimposition of the same "board-to-board" ratemaking theory rejected by this Court. The FCC has nullified the very reasons separations was implemented, i.e., to abandon the inequities of "board-to-board" ratemaking, thereby avoiding the inclusion of all loop costs (NTS costs) in what otherwise amounts to an

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> 90. Exchange plant that an end user or subscriber would need in order to use any local or long distance service is often described as non-traffic sensitive or NTS plant because the cost of providing such equipment does not vary with usage. NTS encompasses all equipment that a subscriber would need to access the local exchange switch including terminals and other customer premises equipment, the protection block and drop wire and the line or loop between the customer's premises and a local exchange switch or a manual switchboard.

Access Charge Order, at para. 90. This definition corresponds to the jointly-used local exchange plant defined in Smith v. Illinois Bell. See, supra, n. 1.

interstate local exchange rate. The Access Charge Order clearly acknowledged the applicability of Smith v. Illinois Bell in properly allocating the costs between the interstate and intrastate jurisdiction.

> It is the separations process that determines what costs must be recovered from the interstate jurisdiction ....

Access Charge Order, at para. 13. Despite this admission by the FCC that the separations process is essential to equitable cost recovery, the FCC concluded that Smith v. Illinois Bell is not violated where the majority of NTS costs[4] assigned to the interstate jurisdiction are recovered through flat per-line charges that are assessed upon all end users as a precondition to obtaining local service.

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[4] Fixed costs assigned to the interstate jurisdiction for customer premises equipment, inside wiring and a universal service fund are to be recovered via "carrier's carrier charges" on interstate carriers. Access Charge Order, at para. 3.

The FCC's attempt to avoid the mandate of Smith v. Illinois Bell was erroneously premised on a jurisdictional rationale:

> The Court merely attempted to ensure that state or federal regulators did not exceed the limits of their respective powers when they determine economic and social policy questions that have been entrusted to their judgment.

Access Charge Order, at para. 60. The D.C. Circuit violated the mandate of Smith v. Illinois Bell in much the same manner.

The Court first recognized that "(i)n Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930), the Supreme Court decided that, because local plant is used for interstate calls, an appropriate percentage of local plant costs should be placed within the jurisdiction of federal rather than state regulators." NARUC v. FCC, No. 83-1225, slip op. at 21, NARUC Appendix A at 21. The Smith v. Illinois Bell Court, however, went further to state that:

> The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction .... (T)he validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed.

282 U.S. at 149 (Emphasis added).

Hence Smith v. Illinois Bell unequivocally required that: (1) there be an allocation of jointly used local exchange property between the interstate and intrastate jurisdictions based approximately on "the actual uses to which the property is put", 282 U.S. at 151, and (2) the recovery of NTS costs by the local exchange company must be recovered from the respective jurisdictions to which these costs flow.

The D.C. Circuit, like the FCC, erroneously limits Smith v. Illinois Bell to the first criteron stated above:

> Smith dealt with jurisdiction; it held that a portion of the costs of local subscriber plant may be recovered only

> under the authority of a body with interstate regulatory powers. The Smith Court did not address the manner in which the federal agency was to perform its task. It did not hold that the FCC must order recovery of costs allocated to its jurisdiction through usage-based charges.

NARUC v. FCC, No. 83-1225, slip op. at 37-38, NARUC Appendix A at 37-38.

The D.C. Court chose to distinguish Smith v. Illinois Bell by emphasizing that Smith did not mandate that common costs allocated to the interstate jurisdiction be recovered on a usage-sensitive basis. This point is dictum and clearly provides no legal basis for the FCC's abandonment of Smith and the reimposition of the costs and associated revenue requirement allocated by Smith to the interstate jurisdiction back to the intrastate jurisdiction for recovery.[5]

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[5] The method of recovering the allocated interstate costs was not a central issue in Smith v. Illinois Bell. However, it

The crucial issue, ignored by the D.C. Circuit, is that Smith requires the allocated interstate costs to be recovered from the interstate jurisdiction. The FCC's imposition of the interstate NTS costs on the local exchange ratepayers as a precondition to obtaining local service is essentially an

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should be noted to the Court that the flat per-line end-user access charge imposed by the FCC is based on nationwide, average, interstate NTS costs. Access Charge Order, at para. 25. Noted economist Alfred E. Kahn had these recent observations on systemwide average costs as a basis for computing access charges:

> There are undoubtedly differences among the costs (average as well as marginal) of providing subcategories of these services - by type of customer, location, time-of-day, whatever - sufficiently great that basing the rates for customer access, local measured usage, and interexchange usage on systemwide average costs does excessive violence to both reality and the dictates of economic efficiency.

Kahn, The Next Steps in Telecommunications Regulation and Research, 114 Pub. Util. Fort. 13, at 16 (July 19, 1984) (Emphasis added).

increase in intrastate rates designed to recover interstate costs. The FCC unequivocally acknowledges that:

> a flat monthly charge reflecting interstate subscriber loop costs would represent an increase in the total fixed charge that a (local, intrastate) subscriber must pay in order to receive local, exchange service.

Reconsideration Order, at para.8. This additional intrastate charge violates Smith's mandate that allocated interstate costs be recovered from the interstate jurisdiction. Practically speaking, the inequitable interstate toll subsidy imposed upon local ratepayers that Smith was designed to cure has been abrogated by the FCC and D.C. Circuit.

In sum, the FCC's Access Charge Order, endorsed by the D.C. Circuit, essentially repeals the mandate of Smith that a local telephone company's allocated interstate costs must be recovered from the interstate jurisdiction. The D.C. Circuit opinion

directly conflicts with the decision of this Court in Smith v. Illinois Bell. NASUCA and SCCA respectfully request that this Court exercise its certiorari jurisdiction and overrule the decision of the D.C. Circuit.

B. THE FCC'S PRESCRIPTION OF RATES AND REVENUE REQUIREMENTS WITHOUT AN EVIDENTIARY HEARING OF RECORD WAS AN UNPRECEDENTED DEPARTURE FROM THE PROCEDURAL REQUIREMENTS OF SECTION 205(A) OF THE COMMUNICATIONS ACT OF 1934.

Petitioners NASUCA and SCCA alternatively petition this Court to accept jurisdiction of the instant case on the ground that the FCC's prescription of rates and revenue requirements in its Access Charge Order was accomplished in violation of the "full opportunity of hearing" requirement of 47 U.S.C. sec 205(a).[6] See, Rules of the Supreme Court of the United States, Rule

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[6] See Appendix for full text of 47 U.S.C. sec. 205(a).

17(1)(a).[7] Title 47 U.S.C. sec. 205(a) provides in pertinent part:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or ... what classification, regulation, or practice is or will be just, fair and reasonable....

47 U.S.C. sec 205(a) (Emphasis added).

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[7] Rule 17(1)(a) states in pertinent part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> > (a) When a federal court of appeals... has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The Access Charge Order, based upon absolutely no evidentiary record, represents an unprecedented prescription of rates (charges) in terms of revenue requirement magnitude. Consider the huge revenue requirement and rates outlined by the FCC.

> The amount of money that will have to be recovered through the access tariffs is immense. The revenue requirement for interstate NTS exchange plant alone will be approximately 8.5 billion dollars in 1984, the first year of our plan. An additional amount of approximately 2.5 to 3 billion dollars will be required to recover the costs of traffic sensitive plant for the first year. Based upon the assumption that 100 million lines will be in use in 1984 (an assumption we consider to be reasonably accurate), this translates into a total revenue requirement per access line of approximately $8.50 per month for NTS costs and $3.50 to $3.00 per month for traffic sensitive costs. In its first year the plan would assign $4.00 per line per month or $4.35 billion [8] overall in interstate NTS costs to be recovered directly from the end used by his or her

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[8] This number ($4.3 billion) appears to have changed to $3.5 billion based upon certain assumptions and projections made by the FCC. See Reconsideration Order, at para. 117.

> local telephone operating company. Of this amount a minimum of $2.00 for residential subscribers and $4.00 for business subscribers would have to be recovered through the use of a flat charge.[9]

Access Charge Order, at para. 25 (Emphasis added).

The FCC's notice and comment proceedings in the instant case were procedurally insufficient to meet the "full opportunity for hearing" requirement of section 205(a). This conclusion is based on the fact that prior FCC and D.C. Circuit cases unequivocally mandate a trial type evidentiary hearing under section 205(a) prior to the FCC exercising its power to prescribe rates (charges) and revenue requirements.

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[9] End user charges or residential and single-line business users have been deferred until June 1985 and capped at $4.00 per month through 1990. Further Reconsideration Order, at paras. 4, 20. Multi-line business access charges, beginning at $6.00 per month were implemented on May 25, 1984. See Reconsideration Order, at para. 33.

The FCC and D.C. Circuit erroneously premised its defense of notice and comment proceedings in the case sub judice by reference to American Tel. and Tel. Co. v. FCC, 572 F.2d 17, 21-23 (2d Cir.), cert. denied, 439 U.S. 875 (1978). Access Charge Order, at para. 44, n. 18; NARUC v. FCC, No. 83-1225, slip op. at 53, NARUC Appendix A at 53. This case is inapposite, however, as it dealt with the FCC's authority to prescribe practices, not revenue requirements and rates to end users.

> The prescription of unlimited resale and sharing of private line services was an exercise of the FCC's authority under sec. 205(a) of the Communication Act to prescribe practices.

American Tel. & Tel. Co. v. FCC, supra, at 21 (Emphasis added).

The attempt by the FCC and D.C. Circuit to support the notice and comment procedures in the case sub judice under American Tel. & Tel. Co. v. FCC is in direct contravention of

the section 205(a) hearing requirement for prescription of charges determined in Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975).

In Nader v. FCC, the petitioners challenged an FCC order determining a rate of return for AT&T. The Court, citing FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 584, (1942), first emphasized that "prescribing rates involves a number of steps, one of which is the establishment of a fair rate of return." Nader v. FCC, at 201 (Emphasis added). Moreover, the Court held that "since the rate of return is one component of a charge, and the charges prescribed must properly reflect the allowable rate of return, the prescription of a rate is fully consistent with the prescription of charges." Id., at 204 (Emphasis added).

The Nader Court then turned to the procedural requirement of section 205(a):

> The essential elements of a valid prescription order are a full opportunity to be heard and finding that the

> action is just and reasonable. There can be no doubt that AT&T had a full hearing on the rate of return issue and has not appealed that determination.

Id., (Emphasis added; citations omitted).

The holding of the D.C. Circuit in Nader v. FCC lends itself to one simple conclusion, to wit, if a hearing is required under section 205(a) to determine one component of a rate or charge, then obviously an evidentiary hearing must be held to determine all components of a rate or charge.

Indeed, the D.C. Circuit has no quarrel with the above rationale. The Court acknowledged a plethora of FCC precedent mandating that an evidentiary hearing be held to satisfy the section 205(a) "opportunity to be heard" requirement:

> NASUCA points to cases in which the Commission has investigated the lengality of carrier-filed rate increases, see, e.g., In re AT&T, 57 F.C.C. 2d 960 (1976), determined a carrier's revenue requirements as part of an assessment of the legality of its charges, see In re AT&T, 9 F.C.C. 2d 30, modified, 9 F.C.C. 2d 960 (1967), or

> evaluated a carrier request to increase its prescribed rate of return. In re AT&T, 73 F.C.C. 2d 689 (1979).

NARUC v. FCC, No. 83-1225, slip op. at 54, NARUC Appendix A at 54.

The FCC's acknowledgement of the hearing and record requirements which 47 U.S.C. sec. 205(a) imposes upon the Commission when it prescribes rate and revenue requirements was further demonstrated in In re AT&T (the Telpak case), 61 F.C.C. 2d 587 (1976), aff'd in part, rev'd in part sub. nom., Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981). In the Telpak case, the Commission considered the revenue requirements and tariff levels of certain private line services offered by AT&T. It discussed the hearing and record requirements which section 205 imposes upon the FCC in its rate prescription authority as follows:

> Section 205(a) of the Communications Act give us authority to prescribe charges, classifications, regulations, and practices of communications common carriers. Any such prescription can only be made after full opportunity for hearing and upon a finding that the action taken is just and reasonable as supported by evidence of record.

AT&T, 61 F.C.C. 2d at 660-661 (Footnotes omitted). In the Telpak case, the "opportunity for hearing" and evidence of record required by section 205 consisted of approximately 2 years of evidentiary hearings including 53 witnesses and 27 thousand pages of transcript and exhibits. Id., at 595.

In the case sub judice, notwithstanding the Commission's reliance on the same section of the Communications Act (sec. 205) as it relied upon in the Telpak case, not one page of an evidentiary record exists to support this unprecedented prescription of rates and revenue requirements for end-user access charges. The strikingly different view the F.C.C. has taken in the instant case of

section 205's hearing and record requirements has resulted in the prescription of access charges without an evidentiary hearing on the components of those charges. For instance, what rate of return was employed by the Commission in determining the 1984 $8.5 billion revenue requirement which, subject to adjustment,[10] it found to exist? Upon what capital structure was such a return predicated? What investment level was used to compute that revenue requirement? What level of operating and maintenance expenses was used? What is the source of the Commission's assumption that approximately 100 million access lines exist?[11] What interpretations were employeed in the use of the Separations

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10 See, supra, n.8.

11 See Access Charge Order at para. 25.

Manual?[12] The FCC's failure to conduct an evidentiary hearing on these rudimentary ratemaking components as a predicate to the instant rate and revenue requirement prescription is an unprecedented departure and blatant violation of the sec. 205 "opportunity to be heard" requirement as defined by the above-cited FCC case and Nader v. F.C.C., supra.

The D.C. Circuit chose not to address the procedural scars wrought on these proceedings by the FCC's failure to conduct an evidentiary hearing on the ratemaking components comprising the access charges.

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[12] The Separations Manual is incorporated into the F.C.C.'s Rules, 47 C.F.R. sec. 67.1 (1979). See Jurisdictional Separations of Telephone Companies, 16 F.C.C. 2d 317, 331 (1969). The Manual was revised pursuant to the "Ozark Plan" recommended by the Federal-State Joint Board convened pursuant to 47 U.S.C. sec. 410(c). See Separations Procedures, 26 F.C.C. 2d 247 (1970).

Instead, and incredulously, the D.C. Circuit attempts to distinguish factually the instant case on the ground that the FCC did not prescribe rates or revenue requirements.

> [T]he FCC prescribed no specific revenue requirement and did not determine the legality of specific rates. On the contrary, the Commission initiated broad-gauged rulemaking to develop policies for the interstate long-distance market and it set prospective, policy-implementing rules.

NARUC v. FCC, No. 83-1225, slip op. at 54, NARUC Appendix A at 54.

NASUCA and SCCA respectfully submit that multi-line business end users currently paying a flat interstate access fee of $6.00 per line as a result of these proceedings would disagree with the D.C. Circuit's assessment. Residential and single-line business end users paying increased local rates for interstate access as of June 1985 as a result of these proceedings would also disagree with the D.C. Circuit's reasoning. It is an undisputed fact that the flat per

line end user access charges resulting from these proceedings are based on the aforecited revenue requirements projected by the FCC and represent a prescription of the above stated rates - not policies.

By the FCC's own admission, this case presents perhaps "the most difficult" and probably "the most important" problem ever to come before the agency. Access Charge Order, at para. 368; NARUC v. FCC, No. 83-1225, slip op. at 19 NARUC Appendix A at 19. The FCC and D.C. Circuit have repeatedly interpreted section 205(a) to require a hearing and evidentiary record as a predicate to the prescriptive authority of the Commission to set rates (charges) and revenue requirements. Petitioners respectfully request this Court to accept jurisdiction of this case on the ground that the Commission's failure to hold an evidentiary hearing in the instant revenue requirement and rate prescription case was an

extreme and unsubstantiated departure from the accepted and usual course of such Commission proceedings and that these procedurally defective proceedings have been erroneously affirmed by the D.C. Circuit.

CONCLUSION

For the reasons set forth herein, Petitioners NASUCA AND SCCA pray that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia.

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APPENDIX - STATUTES

47 U.S.C. sec. 151

Section 151. Purposes - Federal Communications Commission created. - For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purposes of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to

interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission" which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act. (June 19, 1934, c. 652, Title 1 § 1, 50 Stat. 189)

47 U.S.C. sec. 152(b)

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or

in connection with intrastate communication service by wire or radio or any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio

cc munication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise proviced therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

(As amended Feb. 21, 1978, Pub. L. 95-234, §5, 92 Stat. 35.)

47 U.S.C. sec. 205(a)

205. Commission authorized to prescribe just and reasonable charges - Penalties for violations - (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any

charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall

conform to and observe the regulation or practice or prescribed.

47 U.S.C. sec. 410(c)

(c) Federal-State Joint Board; reference of proceedings regarding jurisdictional separation of common carrier property and expenses between interstate and intrastate operations and other matters relating to common carrier communications of joint concern; jurisdiction, powers, duties, and obligations; recommendation of decisions; State members; presence at oral arguments and nonvoting participation in deliberations; composition; Chairman.

The Commission shall refer any proceeding regarding the jurisdictional separa-

tion of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer another matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not

vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions as referred to in sections 302(b) and 305(f) of Title 49, and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

(As amended Sept. 30, 1971, Pub.L. 92-131, §2, 85 Stat. 363.)